

MAY 13 2004

Before the  
**Federal Communications Commission**  
 Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION  
 OFFICE OF THE SECRETARY

In the Matter of	)	MM Docket No. <b>01-65</b>
	)	RM-10078
Amendment of Section 73.202(b),	)	RM-10188
	)	RM-10189
Table of Allotments,	)	
FM Broadcast Stations.	)	
(Emmetsburg, Sanborn and Sibley,	)	
Iowa, and Brandon, South Dakota	)	
and Sibley, Iowa)	)	

To: The Commission

**REPLY TO**  
**OPPOSITION TO APPLICATION FOR REVIEW**

Saga Communications of Iowa, LLC ("Saga"), by its attorneys and pursuant to Sections 1.115 of the Commission's Rules, hereby files this reply to the Opposition to Application for Review filed April 30, 2004, by Jim Dandy Broadcasting, Inc. ("Jim Dandy") directed against Saga's appeal of the action taken in the Memorandum Opinion and Order, *Brandon, SD, Emmetsburg, Sanborn and Sibley, IA*, 69 Fed. Reg. 12277, published March 16, 2004 ("MO&O").<sup>1</sup> In support whereof, Saga shows the following:

**Saga's Application Is Timely**

Passing over the overall disrespectful and vituperative tone of the Opposition, we quickly dispose of Jim Dandy's incorrect argument that Saga's application for review is

<sup>1</sup> Pursuant to Section 1.115(d), this Reply is timely filed by May 13, 2004 (Section 1.115 affords parties 10 days to file a reply, and Section 1.4 affords parties an additional 3 days if the Opposition were served by mail (which Jim Dandy's was).

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untimely.<sup>2</sup> Jim Dandy erroneously claims that Section 1.4(b)(3) of the Rules required Saga's application for review to be filed no later than March 29, 2004, and is 17 days late – “egregiously untimely.” Instead, Jim Dandy is egregiously off base. Section 1.4(b)(3) covers the fixing of the public notice date for “rulemakings of particular applicability,” which this rule making is not. The amendment of the Table of Allotments is a rulemaking of general applicability. See *Prineville and Sisters, Oregon*, 8 FCC Rcd 4471 (1993) that settled the question:

We therefore conclude that, for purposes of the notice and comment and publication requirements of the Administrative Procedure Act and hence for our computation of time rules, broadcast allotment proceedings are rulemakings of general applicability.

Therefore, Section 1.4(b)(3) is not applicable. Instead, Section 1.4(b)(1) applies, since it covers “all documents in notice and comment and non-notice and comment proceedings.” It was appropriate, in fact, required, that the FCC publish the MO&O in the Federal Register so that parties other than Saga and Jim Dandy could have participated. Saga's application for review was timely filed.

**The Method Used by the Commission  
Staff to Compute Population Resulted in an Inaccurate Population Count**

Turning now to its substantive aspects, Jim Dandy's Opposition continues to support the Audio Division's findings, attaching technical studies from Graham-Brock, Inc., and D. L. Markley & Associates, Inc. Both firms apparently prepared their studies by analyzing the population in perfect circles from the respective allotment reference points without regard for “real-world” population coverage. This method would be

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<sup>2</sup> Saga can only hypothecate that Jim Dandy didn't think much of this argument, since it was buried in a footnote.

acceptable if the comparison were between two purely theoretical facilities, but the existence of actual facilities of Station KDWD changes the situation. Both consultants used the real world actual 60 dBu contour for the KDWD licensed facilities (which Saga agrees is appropriate). However, they mistakenly continued to use the perfect circle for the KDWD CP even though it now operates on program test authority from the same tower and height as does the KDWD licensed facilities.

Attached hereto, and incorporated herein by reference, as Engineering Exhibit EE is a report prepared by John J. Mullaney of Mullaney Engineering, Inc., that addresses Jim Dandy's technical studies and demonstrates why, in this case, the method of computing the population should not be based on hypothetical perfect circles<sup>3</sup> in this case. Mr. Mullaney shows that the upgrade of the Brandon allotment results in a larger gain in population (at least 1,770 persons) than does the upgrade of the KDWD, Emmetsburg, facilities. Mr. Mullaney states that the bulk of the population evaluation was derived from Jim Dandy's studies except for the use of the actual 60 dBu contour with terrain rather than the allotment reference circle. Because KDWD already has a construction permit and is operating its Class C3 facilities under program test authority, computing populations based upon actual 60 dBu contours is appropriate and required in this narrow instance.

Jim Dandy relies heavily on *Woodstock and Broadway, Virginia*, 3 FCC Rcd 6399 (1988), which, ironically, supports Saga's position that the use of actual terrain data is a more accurate method of prediction of population coverage for an existing facility in certain situations. In *Woodstock*, the Commission first rejected, but on review accepted,

a rule making proposal where adequate city-grade coverage could only be shown by the use of the “standard prediction method, but relaxing the normal assumption of uniform terrain.” The Commission changed its methods because it felt, to do otherwise “would elevate form over substance to apply that assumption here.” That is precisely the case here.

Jim Dandy cites several cases in footnote 7 which also support Saga’s argument. In *Dos Palos, Chualar and Big Sur, California*, 19 FCC Rcd 1826 (2004), the Audio Division permitted the use of actual terrain data to determine whether 50% or more of an Urbanized Area would be covered by a 70 dBu signal, warranting a *Tuck*<sup>4</sup> showing (required when a station is proposing to move from a community located outside of an Urbanized Area to another community located outside of but proximate to an Urbanized Area.) The other cases cited by Jim Dandy<sup>5</sup> relate to using the “Woodstock” exception in showing city grade coverage by an existing, upgrading licensee.

The thrust of *Woodstock* and its progeny is that theoretical methods of computing signal contours may not be as accurate as the use of actual contours. For the purposes of determining under Section 307(b) which allotment is preferred on the basis of greater service to new population, the most accurate method of computation should be used.

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<sup>3</sup> Mr. Mullaney references Saga’s Freedom of Information Act Request that revealed the Audio Division’s use of perfect circles to compute the population.

<sup>4</sup> *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988).

<sup>5</sup> *Cloverdale, Montgomery and Warrior, Alabama*, 12 FCC Rcd 2090 (1997); *College Station and Gause, Texas*, 11 FCC Rcd 5326 (1996); *Alfred, Campbell and Waverly, New York*, 8 FCC Rcd 8662 (1993); *Hartford, Utah*, 8 FCC Rcd 4920 (1993) and *Stuart and Boone, Iowa*, 6 FCC Rcd 6036 (1991).

That means the actual contours of KDWD as a Class A station and as an upgraded Class C3 station operating from the KDWD site.

The Commission should take this opportunity to make it clear that, in comparing the public interest benefits from an increase in population, the method to be used for vacant allotments is to assume uniform terrain, but for an existing facility seeking to upgrade, the method to used is the actual coverage afforded by the existing facility and the upgraded facility. To do otherwise would "elevate form over substance."

### **Jim Dandy Failed to Preserve Its Right to Review**

Finally, it should be noted that Jim Dandy is trying to improperly raise an issue that it has waived. At footnote 8, Jim Dandy says it "reasserts and incorporates by reference" its argument (not addressed in the MO&O) that Saga was not permitted to seek an upgrade of a vacant FM channel. Jim Dandy may not reassert or incorporate by reference any such thing, and it knows full well it cannot do so. If Jim Dandy wanted to preserve its rights to contest that point, it could have filed its own application for review of the MO&O. The Audio Division had no problem with Saga's counterproposal and properly considered it. As Jim Dandy failed to preserve this issue, it has waived its right to object at this juncture. See *Charles T. Crawford, et al.*, 17 FCC Rcd 2014 (2002) (because a party did not raise arguments previously, consideration of the arguments at a later stage was precluded by Section 1.115(c) of the Commission's Rules.)

### **Conclusion**

Wherefore, Saga respectfully requests the Commission to reverse the MO&O and adopt Saga's counterproposal by allotting Channel 261C3 to Brandon, South Dakota.

Respectfully submitted,

**SAGA COMMUNICATIONS  
OF IOWA, LLC**

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May 13, 2004

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**ENGINEERING EXHIBIT EE:**

**REPLY TO OPPOSITION TO  
APPLICATION FOR REVIEW  
FM TABLE OF ALLOTMENTS  
EMMETSBURG, SANBORN AND SIBLEY, IOWA  
AND BRANDON, SOUTH DAKOTA  
MM DOCKET 01-65**

**MAY 12, 2004**

**Prepared on Behalf of  
Saga Communications**

**ENGINEERING EXHIBIT EE:**

**REPLY TO OPPOSITION TO  
APPLICATION FOR REVIEW  
FM TABLE OF ALLOTMENTS  
EMMETSBURG, SANBORN AND SIBLEY, IOWA  
AND BRANDON, SOUTH DAKOTA  
MM DOCKET 01-65**

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## - Submitted April 2004.

## Declaration

I, John J. Mullaney, declare and state that I am a graduate electrical engineer with a B.E.E. and my qualifications are known to the Federal Communications Commission, and that I am an principal engineer in the firm of Mullaney Engineering, Inc., and that I have provided engineering services in the area of telecommunications since 1977. My qualifications as an expert in radio engineering are a matter of record with the Federal Communications Commission.

The firm of Mullaney Engineering, Inc., has been requested by Saga Communications to prepare the instant engineering exhibit in support of a reply to an opposition to its application for review in MM Docket 01-65 concerning an amendment to the FM Table of Allotments.

All facts contained herein are true of my own knowledge except where stated to be on information or belief, and as to those facts, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

/s/ John J. Mullaney

John J. Mullaney, Consulting Engineer

Executed on the 12th day of May 2004.

**ENGINEERING EXHIBIT EE:**

**REPLY TO OPPOSITION TO  
APPLICATION FOR REVIEW  
FM TABLE OF ALLOTMENTS  
EMMETSBURG, SANBORN AND SIBLEY, IOWA  
AND BRANDON, SOUTH DAKOTA  
MM DOCKET 01-65**

**NARRATIVE STATEMENT:**

This engineering statement has been prepared on behalf of Saga Communications. The purpose of this statement is to support a reply to an opposition to the application for review in MM Docket 01-65 which proposes to amend the FM Table of Allotments at Emmetsburg, Sanborn and Sibley, Iowa and Brandon, South Dakota. The opposition was filed by Jim Dandy Broadcasting, Inc. (Jim Dandy).

The MO&O released on February 27, 2004, denied Saga's petition for reconsideration. Saga filed a counterproposal requesting an upgrade from Ch. 261A to 261C3 of the vacant allotment at Brandon, SD, be preferred in lieu of the upgrade by KDWD from Ch. 261A to 261C3 at Emmetsburg, IA. The denial of the reconsideration was singularly based upon the staff's own engineering review which concluded that the 60 dBu population gain resulting from an upgrade at Brandon was 24,614 persons while the population gain at Emmetsburg was 28,929 persons. This updated analysis by the staff was based upon data taken from the 2000 U.S. Census which was not available during the original proceeding. The MO&O stated that the updated analysis using the 2000 Census was consistent with their

earlier calculations and support the initial decision that the upgrade at Emmetsburg was preferred because it resulted in a greater 60 dBu population gain (4,315 more persons).

Mullaney Engineering has made its own independent calculation of the 60 dBu populations gains and herein revises its original evaluation to use allotment reference circles, **where appropriate**. However, even after making these adjustments it has been determined the Brandon upgrade still results in at least **1,770 more persons** receiving new 60 dBu service and therefore, the upgraded C3 operation at Brandon, SD, should be the preferential arrangement of allotments when compared to the upgrade C3 operation by KDWD at Emmetsburg, IA. Based upon a review of the opposition it is now clear that the argument over which proposal results in a greater population gain is directly tied to the use of **reference allotment circles** versus **60 dBu coverages** based upon use of average terrain along each of the radial directions.

### **Opposition by Jim Dandy**

The technical portion of Jim Dandy's opposition is that Saga's technical showing relied upon 60 dBu coverage projections which incorporate the variances associated with the 3 to 16 km terrain averages surrounding each of the sites being evaluated. They argue that established FCC policy is to utilize "allotment reference circles" when evaluating projected coverages in allotments rule makings. It should be understood that this policy stems from the FCC's goal to be "administratively convenient" by lessening the burdens on the staff. That policy pre-dates the implementation of the computer age in which every engineer has a personal computer at their desk or at least within arm's reach. As seen in this case, when a technical agency is too "administratively convenient" they sacrifice the original intent of the

rules to determine the public interest. However, changing that policy is a fight for another day.

At issue here is which of two conflicting FM upgrade proposals will result in the largest population increase. Those proposals are as follows:

1. The existing operation on Ch. 261A by KDWD at Emmetsburg, IA.
2. The proposed allotment upgrade by KDWD from 261A to 261C3. However, that proposal is more than a proposal since KDWD sought and was granted in May 2003 a CP to operate as a C3 facility from its existing site.
3. The existing vacant Class A allotment on 261A at Brandon, SD.
4. The proposed allotment upgrade at Brandon from 261A to 261C3.

The **Woodstock and Broadway**, Virginia, case cited by Jim Dandy does permit the use of coverage contours based upon actual terrain. If the proponent of an allotment, which is **reserved for their sole use**, establishes its ability to use the site (own, lease or rent) and that the proposed tower height has received approval from the FAA then the FCC will permit use of terrain to predict coverage. In addition, it is common practice to use contours based upon terrain for all authorized facilities. Based upon this we believe that it is appropriate to **use terrain** when determining populations for items **1 and 2** above. But the standard **allotment circles** should be used for items **3 & 4** above (this is contrary to the method used in Saga's engineering of April 2004).

It should be noted that Jim Dandy's opposition was supported by two separate engineering statements. Both of those independent consulting engineers concluded that KDWD's existing Class A facility (item 1) should **use terrain** when determining its contour

(Saga agrees). However, the normal **reference circles** were used to determine the populations for items 2, 3 & 4. It should also be noted that both of Jim Dandy's engineers referred to item 2 as an "allotment". However, KDWD's C3 is actually a CP and in fact has a license application pending. We believe that is why both engineers used a reference circle and not actual terrain to determine the coverage of this authorized/built facility. However, now that KDWD has an **existing CP/PTA** it clearly falls within the exception **established by Woodstock for use of actual terrain.**

### **Population Analysis**

**Figure 3** is a revised version of the map which was originally submitted in April as **Figure 2**. This revised version now includes allotment reference circles for items 2, 3 & 4 as well as the original terrain contours for those items. The reference circles are indicated as dashed lines. The following is a comparison of the various populations as essentially reported in the two engineering reports submitted with Jim Dandy's opposition. All population figures are for 2000 U.S. Census.

	<b>Graham-Brock</b>	<b>D.L.Markley</b>	
<b>Emmettsburg</b>			
KDWD Lic	24,626.#	24,466.#	
<b>KDWD C3-CP</b>	<b>49,130.##</b>	<b>49,130.##</b>	
<b>Change CP-Lic</b>	<b>(+24,504.)</b>	<b>(+24,664.)</b>	<b>within 160. Persons</b>
<b>Brandon</b>			
Vacant Class A	158,390.&	158,082.&	
<b>ADD C3</b>	<b>184,703.&amp;</b>	<b>184,519.&amp;</b>	
<b>Change ADD-Vac</b>	<b>(+26,313.)</b>	<b>(+26,437.)</b>	<b>within 124. Persons</b>
<b>Gain by Brandon vs: Emmetsburg</b>			
<b>Brandon C3 over CP</b>	<b>(+1,809.)</b>	<b>(+1,773.)</b>	

- & - Computed by other consultant using terrain Reference Circles  
A=28.3 km C3= 39.1 km
- # - Computed by other consultant using terrain
- ## - Computed by Mullaney Engineering using terrain

From the above figures it was determined that the upgrade at Brandon will provide 60 dBu service to at least 1,770 more persons than will the upgrade at Emmetsburg. It should be understood that the populations presented above are essentially identical to the populations presented by Jim Dandy's two consulting engineers with only one

**exception.** That is the population for the KDWD C3 is for the facilities authorized by the CP **using terrain rather than a reference circle.** Use of the unrealistic reference circle in lieu of the authorized facilities inflates the advantages of the Emmetsburg C3 upgrade by 4,169 persons according to the computation of Graham-Brock and by 3,923 persons according to the computations of D.L.Markley. Use of this inflated number does in fact conclude that Emmetsburg provides a greater population gain. However, given that contours based upon terrain should have been used this conclusion is **factually incorrect.**

Based upon work notes provided by the FCC (via an FOIA request filed by Saga), it appears that the staff engineer used allotment reference circles **for all four** of the population figures.

### **Changes in Circumstances**

Since this rule making was initially filed in December 2000 the 2000 U.S. Census has now become available. The staff included this updated census information into its analysis and published its decision in February 2004. However, that updated evaluation by the staff failed to include the fact that KDWD not only sought and was granted a CP but in August 2003, KDWD implemented operation of their new C3 facility. Thus, they are now presumably operating under Program Test Authority. To continue using theoretical allotment circles is a dis-service to the public. In this case, using the allotment reference circle the public has come out on the short end **unless the decision is reversed.**

A review of the KDWD C3 CP (available on the Web) indicates that there was a specific condition:

*GRANT OF THIS PERMIT IS CONDITIONED ON THE FINAL OUTCOME  
OF MM DOCKET NO. 01-65. ANY CONSTRUCTION PURSUANT TO*

*THIS PERMIT IS AT THE SOLE RISK OF THE  
PERMITTEE/LICENSEE. A LICENSE TO COVER THIS PERMIT WILL  
NOT BE GRANTED UNTIL THE OUTCOME OF MM DOCKET NO. 01-65  
IS FINAL.*

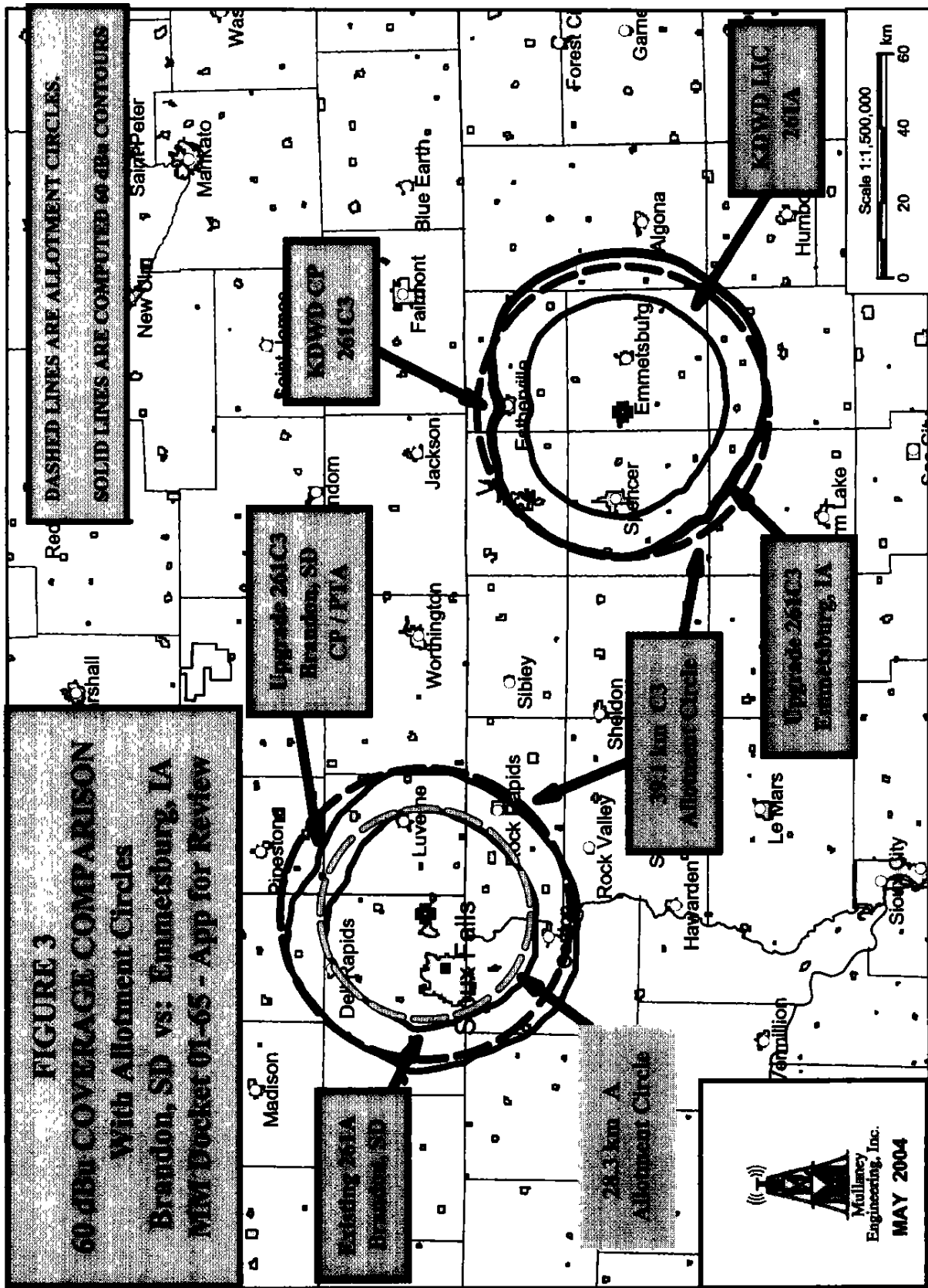
### **Summary**

Saga Communications herein files a reply to the opposition to its application for review of the MO&O in MM Docket 01-65 filed by Jim Dandy Broadcasting, Inc. As presented herein Saga has demonstrated that the upgrade of the Brandon allotment **results in a larger gain** population (at least 1,770 persons) than does the upgrade of the KDWD facilities at Emmetsburg. The bulk of the population evaluation was derived from computations by two of Jim Dandy's own consulting engineers. Consequently, the **population numbers are not in dispute** except for the use of the actual 60 dBu contour with terrain rather than the allotment reference circle. Because KDWD already has a CP and in fact is operating under PTA the use of populations based upon actual 60 dBu contours is **appropriate**. Based upon Saga's population numbers the Brandon, SD, C3 upgrade provides the largest population gain and therefore, should result in a preferential arrangement of allotments when compared to the C3 upgrade operation by KDWD at Emmetsburg, IA and this is **contrary to the conclusions** reached in MM Docket 01-65 which found Emmetsburg to be superior.

/s/ John J. Mullaney

John J. Mullaney, Consulting Engineer

May 12, 2004.




## CERTIFICATE OF SERVICE

I, Sherry Schunemann, a secretary in the law offices of Smithwick & Belendiuk, P.C., hereby certify that on May 13, 2004, copies of the foregoing Reply to Opposition to Application for Review were sent via First Class Mail, postage pre-paid to the following:

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